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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JESSIE SHORT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ANTHONY C. LIOTTA
Deputy Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

EDWARD J. SHAWAKER
ERIC S. GOULD
JAMES E. BROOKSHIRE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

In this case, the Court of Claims held that the individual respondents—who have no nexus to the original portion of the Hoopa Valley Indian Reservation in California and are not members of the Tribe occupying it, but instead claim to be Indians of a separate strip of land added to that Reservation by an Executive Order in 1891—nevertheless have a right to participate in the per capita distribution of revenues derived from the sale of timber on unallotted lands on the original portion of the Reservation. The questions presented by this holding are:

1. Whether, in light of (a) the discretion expressly conferred on the President by statute regarding the manner in which Indians will be settled on Reservations in California, (b) the consistent actions of the Executive and Congress treating the original portion of the Reservation as a unit distinct from the strip added to the Reservation in 1891, and (c) the express authority of the Secretary of the Interior under 25 U.S.C. 407 to use the proceeds from the sale of timber on unallotted lands for the benefit of the "tribe or tribes concerned," the Court of Claims erred in disregarding the determination by the Secretary of the Interior that the revenue from timber sales on the original portion of the Hoopa Valley Reservation should be paid to the members of the Hoopa Valley Tribe, who occupy that portion and are therefore concerned with the exploitation of its resources.

2. Whether, in light of the long recognized authority of Indian Tribes to establish their own standards for membership and the statutory authority of the Secretary to make such determinations where necessary, the Court of Claims erred in assuming the responsibility for determining which of the individual respondents are members of the Yurok Tribe—which traditionally occupied the

strip added to the Reservation in 1891—for purposes of determining whether they are entitled to benefit from revenues generated on the original Hoopa Valley Reservation.

3. Whether, assuming respondents are entitled to benefit from the sale of timber on the original portion of the Reservation, the Court of Claims nevertheless erred in ordering a per capita distribution of those revenues to individual respondents, notwithstanding the express authority of the Secretary of the Interior to use such proceeds for the Indians concerned "in such manner as he may direct."

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OCTOBER TERM, 1981

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JESSIE SHORT, ET AL.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINIONS BELOW

The opinion of the Court of Claims of September 23, 1981 (Hoopa Pet. App. A)[2] is reported at 661 F.2d 150. The Court of Claims' earlier opinion of October 17, 1973 (Hoopa Pet. App. B) is reported at 486 F.2d 561, and this Court's denial of certiorari on that occasion is reported at 416 U.S. 961.

JURISDICTION

The decision of the Court of Claims was entered on September 23, 1981. By order dated December 10, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including Janu-

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[1] The respondents are the Hoopa Valley Tribe and over 3800 individual plaintiffs who claim to be members of the Addition to the Hoopa Valley Indian Reservation. We will lodge with the Clerk of this Court a list of the individual plaintiffs.

[2] "Hoopa Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the Hoopa Valley Tribe in this case.

ary 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATUTES AND EXECUTIVE ORDERS INVOLVED

1. Section 407 of Title 25, United States Code, provides:

> The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to section 413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct.

2. Pertinent portions of Section 2 of the Act of Apr. 8, 1864, ch. 48, 13 Stat. 40, and the Executive Orders of June 23, 1876 and of Oct. 16, 1891, *reprinted in* I C. Kappler, *Indian Affairs—Laws and Treaties* 815 (1904) (hereinafter Kappler), are reproduced in the first opinion of the Court of Claims in this case (Hoopa Pet. App. B 5-6 & n.3, 10 n.4). The Act of June 17, 1892, ch. 120, 27 Stat. 52, is reprinted at Hoopa Pet App. C.

STATEMENT

1. The present Hoopa Valley Indian Reservation in Northern California is comprised of three historically distinct segments, as shown on the map appended to this Court's opinion in *Mattz* v. *Arnett*, 412 U.S. 481, 506 (1973), and reproduced as a frontispiece to the petition for a writ of certiorari filed by the Hoopa Valley Tribe in this case. The three segments are: (1) the original Hoopa Valley Reservation, a twelve-mile-square area of land located on the Trinity River above its confluence with the Klamath River, approximately 50 miles upstream from the Pacific Ocean; (2) the Old Klamath River Reservation, a two-mile-wide strip of land along

the lower 20 miles of the Klamath River before it empties into the Pacific Ocean; and (3) a two-mile-wide strip of land, known as the "Connecting Strip," along the 25-mile stretch of the Klamath River between these two once entirely separate Reservations. The Old Klamath River Reservation and the Connecting Strip were added to the original Hoopa Valley Reservation in 1891; they have often been called the Extension of the Hoopa Valley Reservation (*Mattz* v. *Arnett*, *supra*, 412 U.S. at 494 n.16; *Donnelly* v. *United States*, 228 U.S. 243, 253 (1913)), and are referred to by the Court of Claims in this case as the Addition (Hoopa Pet. App. B 2). Historically, most of the Indians in the square segment constituting the original Hoopa Valley Reservation have been Hoopa Indians, and most of the Indians on the Old Klamath River Reservation and the Connecting Strip have been Yurok (Lower Klamath) Indians. Hoopa Pet. App. B 2; *id.* at A 3. The Hoopas and Yuroks have distinct origins and do not share a common language.[3]

The original Hoopa Valley Reservation (also known as the "Square") is heavily timbered, and most of this timber is on unallotted lands. The Secretary of the Interior has managed the timber resource on the Square on behalf of the Hoopa Indians and certain other Indians having a nexus to the Square, now represented by the Hoopa Valley Tribe. Since the mid-1950s, timber sales on unallotted lands in the Square have generated substantial revenues.[4] Those revenues were distributed per capita to the approximately 1370 persons who were then enrolled members of the Hoopa Valley Tribe, consisting of allottees of land in the Square, non-landholding Hoopa Indians, and long-time residents of the Square who have

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[3] A. Kroeber, *Handbook of the Indians of California* 121-122, 128-130 (1925); Smithsonian Institution, *Handbook of North American Indians—California* 137, 164 (1978).

[4] The revenues totaled approximately $12,650,000 between 1955 and 1969. Hoopa Pet. App. A 3. The revenues have been even greater since that time. See page 15, *infra*.

a prescribed degree of Hoopa blood and who are descended from natives of the Square. Hoopa Pet. App. B 91-92.

The present suit was brought in the Court of Claims in 1963 by some 3323 plaintiffs,[5] principally Yurok Indians, each of whom claims to be an Indian of the Old Klamath River Reservation or the Connecting Strip or the descendant of such an Indian. They asserted a right to participate in the per capita distribution of timber revenues from the unallotted lands on the original Hoopa Valley Reservation and sought to recover from the United States their alleged share of past distributions. The Court of Claims held that individual plaintiff Yurok Indians who can show that they are Indians of these two segments of the Extension must be permitted to participate in the distribution of the timber revenues on the original Hoopa Valley Reservation, even if they do not have a nexus to the original Hoopa Valley Reservation and are not members of the Tribe occupying it.

To facilitate an understanding of the clear error in this and other aspects of the Court of Claims' decisions and the considerations that have impelled us to seek review by this Court, we shall first explain the distinct histories of the three segments of the Reservation and the background of this litigation in some detail.

2. a. The Klamath River Reservation was established on the lower reaches of the Klamath by Executive Order of the President of Nov. 16, 1855 (I Kappler 817), pursuant to authority granted him by the Acts of Mar. 3, 1853, ch. 104, 10 Stat. 238, and of Mar. 3, 1855, ch. 204, 10 Stat. 699, to establish military reservations in California for Indian purposes. *Mattz* v. *Arnett*, *supra*, 412 U.S. at 483-484, 487. Yurok Indians apparently resided in this area for a substantial period prior to 1855 (*id.* at 485-486). The Reservation "was ideally selected for the Yuroks" (*id.* at 487) because its arable land, although

[5] This number has since increased to more than 3800 individuals, with the intervention of more than 500 additional plaintiffs. Hoopa Pet. App. A 2, 4.

limited, was peculiarly adapted to the growth of vegetables and because the Klamath River, which ran through the center of the Reservation, abounded in salmon and other fish (*ibid.*).

In 1861, a freshet destroyed nearly all of the arable land on the Klamath River Reservation, and the Smith River Reservation was established in 1862 in contemplation of creating a new home there for the Yuroks. Only a small number of Yuroks moved to the new reservation, however, and most of those who did returned to the Klamath River Reservation within a few years. *Mattz* v. *Arnett*, *supra*, 412 U.S. at 487-488.

b. At about this time, Congress passed the Act of Apr. 8, 1864, ch. 48, 13 Stat. 39, "An Act to provide for the better Organization of Indian Affairs in California." The principal purpose of the legislation was to streamline and systematize administration of Indian affairs in California, and thereby to save money and improve relations with the Indians. Cong. Globe, 38th Cong., 1st Sess. 1184, 1209, 1370 (1864). Thus, the Act reduced from two to one the number of Indian superintendencies in California and reduced from five to four the number of agents responsible for the Indians on each reservation. *Ibid.*; Sections 1 and 4 of the Act, 13 Stat. 39-40; *Mattz* v. *Arnett*, *supra*, 412 U.S. at 489. Consistent with these administrative goals of the Act, Section 2 provided that there should be set apart by the President, at his discretion, not exceeding four tracts or reservations "of suitable extent for the accommodation of the Indians of said state." 13 Stat. 40. That Section further provided (*ibid.*):

> That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in such state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the

> President may be necessary, in order to its [*sic*] complete adaptation to the purposes for which it is intended.

Pursuant to the authority granted by the 1864 Act, the Superintendent of Indian Affairs for California located the original Hoopa Valley Reservation on August 21, 1864. Hoopa Pet. App. B 18; *Mattz* v. *Arnett*, *supra*, 412 U.S. at 490 n.9. At the same time the Superintendent negotiated and forwarded to Washington a "Treaty" (not formally ratified by the Senate) with the Hoopa and three other named tribes, stating that the Reservation would be set aside for the sole use and benefit of the tribes named in the Treaty or such tribes as might thereafter avail themselves of the benefits of the Treaty. The Klamath (Yurok) Indians were not named in the Treaty. Hoopa Pet. App. B 21-22.[6] In his letter to Washington, the Superintendent favorably described the Reservation and stated that it had land enough in cultivation to feed the approximately 600 Indians then in the Valley or others "that may come there" (Hoopa Pet. App. B 20). Congress recognized the creation of the Hoopa Valley Reservation by passing the Act of Mar. 3, 1865, ch. 122, 13 Stat. 538, which provided for the purchase of certain improvements on it from settlers, and in making appropriation for the Reservation by the Act of Apr. 10, 1869, ch. 16, 16 Stat. 37. See *Mattz* v. *Arnett*, *supra*, 412 U.S. at 490. The Reservation was not formally set aside by Executive Order of the President, however, until June 23, 1876 (I Kappler 815; Hoopa

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[6] The Court of Claims held that, despite the absence of any mention of the Klamath Indians among those expressly enumerated in the caption of the "Treaty," the tribes with whom it was made included the Klamath because they, too, had been at war with the United States. Hoopa Pet. App. B 24. The court also held that because the Klamath later lived in peace in and near the Klamath River Reservation at the lower reaches of the Klamath, as well as upstream, they had availed themselves of the Treaty and thereby became entitled to its benefits. *Id.* at 25.

Pet. App. B 5 n.3). That Order stated that the Reservation was to be "for Indian purposes," as one of the reservations authorized by the 1864 Act.

c. The Klamath River Reservation, which had been established by Executive Order in 1855, was not formally reestablished by a new Executive Order promulgated after the 1864 Act; but it continued during this period, and through 1891, "in *de facto* existence." *Mattz* v. *Arnett*, *supra*, 412 U.S. at 490.[7] The Department of Indian Affairs regarded it as in a state of reservation, apparently intending at some point either to extend the Hoopa Valley Reservation (one of the four permitted under the 1864 Act) to include the Klamath River Reservation or to retain it as a separate reservation under the control of the Indian agent on the Hoopa Valley Reservation. 412 U.S. at 490-491 & n.12; Hoopa Pet. App. B 47-48. Indeed the Assistant Attorney General for the Interior Department concluded in an 1891 opinion that the Klamath River Reservation already was a separate component of the Hoopa Valley Reservation, just as a number of non-contiguous tracts set aside in Southern California for separate bands of Mission Indians had been regarded as constituting a single reservation, one of the four allowed in California under the 1864 Act. *Ibid.*; 33 Pub. Lands Dec. 205, 209-210 (1904); cf. *Mattz* v. *Arnett*, *supra*, 412 U.S. at 493-494 n.15; *Donnelly* v. *United States*, *supra*, 228 U.S. at 258.

Bills were introduced in Congress between 1879 and 1890 to abolish the Klamath River Reservation and open it to settlement. The Commissioner of Indian Affairs opposed these bills unless they were modified to provide for allotments to Indians residing on the Reservation before it was opened to settlement. *Mattz* v. *Arnett*, *supra*, 412 U.S. at 500-502. The status of the Klamath Indian Reservation and the future of the Indians residing

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[7] No separate appropriation was made by Congress for the Klamath River Reservation during this period, apparently because the Yuroks residing there were self sufficient. See 33 Pub. Lands Dec. 205, 210 (1904).

there were rendered more uncertain by a judicial decision in 1888 holding that the Klamath River Reservation no longer existed (*United States* v. *Forty-eight Pounds of Rising Star Tea*, 35 F. 403 (N.D. Cal. 1888)), and a bill passed by the House in 1890 providing for the opening of the Reservation to settlement and for the removal of resident Indians to the original Hoopa Valley Reservation, the expense of removal and the maintenance and education of the Indians to be paid by the proceeds from the sale of the land. *Mattz* v. *Arnett*, *supra*, 412 U.S. at 500-502.

In light of these developments, "the Indian Department moved to have the Klamath River Reservation land protected for the Indians residing there" (*Mattz* v. *Arnett*, *supra*, 412 U.S. at 502). These efforts culminated in the Executive Order of Oct. 16, 1891 (I Kappler 815), which extended the original Hoopa Valley Reservation (the Square) to include a strip of land one mile on either side of the Klamath River between the Square and the Pacific Ocean. The additional area included not only the Klamath River Reservation on the lower reaches of the Klamath, but also "an intervening riparian strip" connecting that Reservation and the original Hoopa Valley Reservation (412 U.S. at 494). The Extension took in the Connecting Strip, rather than simply designating the Klamath River Reservation as a non-contiguous component of the Hoopa Valley Reservation, apparently in order to grant the protection of reservation status to a number of Yurok Indians then residing on the Connecting Strip. Hoopa Pet. App. B 35-36, 50. The President's establishment of the Extension of the Hoopa Valley Reservation was upheld by this Court in *Donnelly* v. *United States*, 228 U.S. 243, 252-253, 255-259 (1913), which viewed the 1864 Act as conferring a "large discretion" on the President, *inter alia*, "to alter and enlarge the reservations from time to time in the light of experience" (228 U.S. at 256-257).

d. Shortly after the 1891 Executive Order was issued, Congress passed the Act of June 17, 1892, ch. 120,

27 Stat. 52, providing for the allotment of lands within the Klamath River Reservation. The Act provided that lands not so allotted would be opened for settlement, with the proceeds to be used by the Secretary of the Interior "for the maintenance and education of the Indians now residing on said lands and their children." 27 Stat 53. In passing the Act, Congress rejected the approach of the House bill, which did not provide for allotments and provided that the proceeds of sale could be used for the removal of the Klamath Indians, presumably to the Hoopa Valley Reservation. *Mattz* v. *Arnett*, *supra*, 412 U.S. at 503.

Pursuant to the 1892 Act, 161 allotments averaging 60 acres each were made to Indians residing on the Klamath River Reservation. Only two of the allottees were Hoopas, and they had resided for many years on the Klamath River Reservation. Hoopa Pet. App. B 56. The allotments included timber lands. 33 Pub. Lands Dec. 205, 217-218 (1904). As required by the 1892 Act, the proceeds of the sale of surplus lands on the Klamath River Reservation were paid into a special Treasury account for the maintenance and education of Indians on that Reservation, and in 1917 the Act was amended to permit the expenditure of the funds for pro rata improvement of allotments made under the 1892 Act and construction of roads and other improvements for the benefit of the Indians covered by the Act. Hoopa Pet. App. B 93. In *Mattz* v. *Arnett*, *supra*, this Court held that "the 1892 Act did not terminate the Klamath River Reservation" (412 U.S. at 505).

In 1898, the Connecting Strip was allotted to the Indians living there under the authority of the General Allotment Act, but pursuant to the same set of administrative instructions that governed the allotment of the Klamath River Reservation. Hoopa Pet. App. B 53-58. Some 499 allotments were made, averaging 40 acres each and including valuable timber land.[8] Of the Indians re-

[8] We have been informed by the Department of the Interior that of the 30,000 acres allotted on the Klamath River Reservation and the

ceiving allotments, again only two were known to be Hoopas, and they were long-time residents of the Connecting Strip. Hoopa Pet. App. B 58.

It was not until 1922 and 1923 that allotments were made on the Square, pursuant to the General Allotment Act of 1887. These allotments were made pursuant to a separate authorization by the President, and the instructions to the agent in the field made clear that the allotments were to be made to Indians located on the Square. Hoopa Pet. App. B 59-61. There were 365 allotments on the Square averaging only 8 acres each. *Id.* at 61. Most of the allottees were Hoopas, although 35 were Redwood, Karok, or Yurok Indians. However, the non-Hoopas who received allotments on the Square all had connections to it, either through their own residence there or that of their parents. *Id.* at 67. The Square's timber lands were not allotted and remained in tribal enjoyment. Revenues produced by these lands are the assets in which the 3800 individual respondents seek to share.

3. The subsequent tribal organization history of the Reservation also manifests a distinction between the Square and the Klamath River portions of the Reservation. On November 20, 1933, the Commissioner of Indian Affairs approved the constitution of the Hoopa Business Council and, in July 1934, the Agency Superintendent advised the Indian office that the Council represented only the 12-mile "Square." Hoopa Pet. App. B 82-83. Soon thereafter, in December 1934, BIA conducted separate elections to determine whether the Indians residing on the Reservation would be organized under the Indian Reorganization Act, ch. 576, 48 Stat. 984. One election was held

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Connecting Strip, some 11,609.75 acres were subsequently sold by supervised or negotiated sale (in which the Bureau of Indian Affairs acted for the individual Indian owners) for a total of $3,836,783.69. An additional 15,769.39 acres were "fee patented" to the Indian owners. BIA and other records (S. Rep. No. 278, 60th Cong., 1st Sess. 18 (1908)) indicate that these lands were heavily timbered, yielding—presumably—substantial income to their Indian owners.

on the original Hoopa Valley Reservation for the Hoopas, and the other was held on the Klamath River territory occupied by the Yuroks. Hoopa Pet. App. B 66.[9] On May 13, 1950, electors of the "Hoopa Valley Tribe" adopted a proposed constitution and bylaws, formally organizing the Hoopa Valley Tribe and conferring its executive authority on a Hoopa Valley Business Council. *Id.* at 86-88. The constitution was approved in 1952 by the Commissioner of Indian Affairs, and Article III of that constitution limits the Tribe's jurisdiction to the Square. *Id.* at 88.

In 1949, in contrast, the Yurok Tribal Organization, a California corporation, was organized to "represent and promote the interests of all persons of Yurok ancestry." Hoopa Pet. App. B 84. Later, in 1955, a group of Indians, presumably Yuroks of the Connecting Strip, adopted a constitution for an organization called the "Yurok Extension Business Organization," which would include Yuroks and exercise jurisdiction over the unallotted trust lands of the Connecting Strip. *Ibid.* The Commissioner refused to approve the organization, on the grounds that it might be confused with the Yurok Tribal Organization and that not all of the residents of the area it sought to represent were Yuroks. *Ibid.*

The separate character of the original Hoopa Valley Reservation and the Addition also has been evidenced by the financial history of the Reservation. For instance, although revenues from both the Square and the Addition were deposited in a single Treasury account until 1955, efforts were made "to relate the benefits from expenditures to the place of the source of funds being expended" (Hoopa Pet. App. B 95). Indeed, beginning in 1955, revenues derived from the Square, the Connecting Strip, and the Klamath River Reservation were deposited in separate accounts. *Id.* at 96. Also, from 1955 through 1979, the Secretary of the Interior—pursuant to requests of the Hoopa Valley Business Council—approved per capita

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[9] Both Tribes rejected organization under the Indian Reorganization Act.

distribution to the Indians on the Hoopa Valley Tribe's official membership roll from the timber revenues on unallotted lands in the Square. *Id.* at 96-97. This practice of approving the Tribe's requests for per capita payments was confirmed by a 1958 opinion of the Deputy Solicitor of the Department of the Interior, rendered in response to efforts by a number of Yurok Indians to share in the growing timber income generated by the Square. The Deputy Solicitor's opinion concluded that no Indians other than the members of the Hoopa Valley Tribe "of the original 12-mile square reservation * * * [had] rights of participation in the communal property on that part of the Hoopa Valley Reservation." 65 Interior Dec. 59, 68 (1958); Hoopa Pet. App. B 98.

4. Many Yurok Indians then turned to the Court of Claims, in this suit against the United States, in their effort to obtain a portion of the timber income on the Square. In an opinion rendered in 1973, the Court of Claims concluded "that the effect of the executive order of 1891 was that all the Indians of the reservation as thereby extended—Addition and Square—got equal rights in the enlarged reservation and thus that the rights of Indians of the Addition are equal to those of the Indians of the Square, the Hoopa Valley Tribe or any other Indians of the reservation" (Hoopa Pet. App. B 105). On the basis of this conclusion, the court held that the United States "acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe, whose rules exclude from membership most of the Indians of the Addition, as the persons entitled to the income from the unallotted trust-status lands on the Square" (*ibid.*). In so holding, the court rejected the government's position that the 1891 Executive Order joined the Square and Addition areas of the Reservation for administrative purposes only and did not integrate the substantive beneficial rights of Indians residing on the respective portions (*id.* at 101-104). This Court, with two Justices dissenting, denied petitions filed by the United States and the Hoopa

Valley Tribe for a writ of certiorari to review the 1973 decision of the Court of Claims. 416 U.S. 961 (1974).

5. a. After 1974, the parties and the trial judge engaged in extensive proceedings to determine which of the 3800 individual plaintiffs qualified as "Indians of the Reservation" who, under the Court of Claims' decision, would be entitled to participate per capita, along with members of the Hoopa Valley Tribe, in the distribution of revenues from the Square. In the meantime, the fundamental relationship of this suit to the resources of the Reservation gave rise to serious Reservation management questions, pertaining to fishing on the Klamath and Trinity Rivers, allotment of individual land holdings, on-Reservation industry, commerce and employment, and access of individuals and tribes to federal program assistance. Responding to these problems, the Assistant Secretary announced on November 20, 1978 what has come to be known as the "Gerard Plan." In obedience to the Court of Claims' 1973 holding, the Plan expressed an intent to treat both the Hoopa Valley Tribe and the Yurok Tribe as beneficiaries of the resources on the Hoopa Valley Reservation as a whole. Until such time that the two Tribes could assume Reservation-wide management, the Department would assume management. Further, under the Gerard Plan, the Department placed a temporary moratorium on per capita payments by the Hoopa Valley Tribe and, beginning on February 1, 1979, placed all trust funds in a single Reservation-wide account.

Efforts to facilitate the organization of a governing body for the Yurok Tribe also were begun. The initial proposal for eligibility to vote on the selection of an interim Yurok Tribal committee was published on December 28, 1978. 43 Fed. Reg. 60670, republished at 44 Fed. Reg. 12210 (1979). Public meetings held on the proposals evidenced a strong sentiment among those eligible to vote that organization might prejudice the rights of the individual plaintiffs in this suit. In the face of

the need for effective Reservation management, however, the Assistant Secretary persevered, publishing final regulations on voting eligibility criteria. 44 Fed. Reg. 24536 (Apr. 20, 1979).

b. In May, 1979, the United States moved to substitute the Yurok Tribe for the 3800 individual plaintiffs in this suit. The motion arose in the context of the same management concerns which led to the Gerard Plan and shared common legal premises: that the unallotted resources of the Hoopa Valley Reservation were enjoyed communally and that the Yurok Tribe was the proper party to determine both its membership and the proper disposition of any beneficial interests it might enjoy on the Reservation.

The Secretary's plans for an election of an Interim Yurok Governing Committee were aborted, however, when certain of the respondents herein sued to enjoin the initial election. That suit was dismissed when the Secretary agreed not to hold the election "without first conducting a referendum in accordance with law in which the voters approve of such an election taking place." *Beaver* v. *Secretary of the Interior*, Civil No. 79-2925 (N.D. Cal. Feb. 11, 1980). A referendum was scheduled, and the establishment of an Interim Yurok Governing Committee was rejected. Hoopa Pet. App. A 6. Thus, the Gerard Plan's organizational initiative failed.

c. By decision dated September 23, 1981, the Court of Claims denied the government's motion to substitute the Yurok Tribe as the proper party plaintiff. The court concluded that its 1973 ruling "that the individual Indians [were] entitled to recover [was] law of the case" (Hoopa Pet. App. A 7). The court further stated that, to the extent it had reexamined the 1973 decision, it was "satisfied that that decision was correct" (*id.* at 8). Similarly, the Court of Claims denied the Hoopa Valley Tribe's motion to dismiss asserting the political question doctrine and nonjusticiability with respect to the determination of what Indians may share in Reservation re-

sources, finding that its previous ruling was the "law of the case" on this issue as well. Hoopa Pet. App. A 12-13. The 1981 decision also directed the trial judge to determine which of the 3800 respondents may share in revenues generated on the Square, concluding that "the standards used to determine the membership of the Hoopa Valley Tribe also provide an appropriate basis for determining which of the plaintiffs are Indians of the Reservation" (Hoopa Pet. App. A 14).[10] The trial judge was directed to develop standards by April 1, 1982 and to apply them to those individual respondents whose cases might be ripe for resolution by that time. *Id.* at 15-16.

REASONS FOR GRANTING THE PETITION

The Court of Claims plainly erred in concluding that respondents, who have no nexus to the original Hoopa Valley Reservation and are not members of the Tribe occupying it, nevertheless are entitled to participate in the per capita distribution of timber revenues from unallotted lands on the original Reservation. The result of this holding may well be to reduce the Indians represented by the Hoopa Valley Tribe, for whose benefit the Square had been managed for more than 100 years, to a minority status on the Square, in the face of the far more numerous individual plaintiffs in this case. Substantial sums are at stake, well in excess of $30 million in timber revenues having been collected on the Square since 1955, and the Hoopa Valley Tribe's right of self determination in the territory it historically has occupied is seriously threatened.

In addition, the holding by the Court of Claims that individual Yurok Indians have a personal right to receive per capita payments is fundamentally at odds with deci-

[10] The court did acknowledge, however, that "there may be differences between the situations of the Hoopas and the Yuroks that necessitate some differences in the standards governing the membership of the two Tribes" (Hoopa Pet. App. A 15).

sions of this Court recognizing that unallotted reservation assets belong to the Tribe, not individual Indians. Moreover, in recognizing a judicially enforceable right to the per capita share, the Court of Claims has assumed the responsibility of the *Secretary* for managing reservation resources and assets derived therefrom, contravening in this case the express statutory requirement in 25 U.S.C. 407 that proceeds of timber sales on unallotted lands shall be used for the benefit of the Indians who are members of the Tribe concerned in such manner as the *Secretary* may direct. The decisions below also have the effect of assigning to the Court of Claims, in derogation of the statutory responsibility of the Secretary and the sovereign prerogative of the Tribe itself, the determination of who will be members of the Tribe entitled to share in the proceeds of reservation activities.

These various rulings have potentially broad—and grave—implications regarding the division of revenues on other reservations set aside for more than one tribe or band, as well as the division of responsibilities among the Secretary, the tribe, individual Indians, and the courts in managing reservation affairs. It is because of these significant considerations that we have again sought review in this Court, despite the Court's previous denial of certiorari in 1974, when the case may have been viewed as essentially interlocutory and its import was far less certain. The intervening period has now illuminated and compounded the manifest errors of the Court of Claims and the unworkability and injustice of the result it has reached, as illustrated by the difficulties surrounding the Secretary's efforts to organize a governing body for the Yurok Tribe to speak on behalf of the Yuroks without the need for continuing intervention by the courts on their behalf in the future. These difficulties now may continue for a further extended period until the trial judge completes the process of ruling on the status of each individual respondent—a process that

may extend well beyond the April 1 target date for the announcement of general standards and ruling on those individual respondents whose cases are ripe for resolution at that time. Review by this Court therefore is warranted.

1. The fundamental error of the Court of Claims, underlying both its 1973 and 1981 decisions and provoking other erroneous rulings, is the holding that Indians of the Klamath River Reservation and the Connecting Strip have a right to the benefit of the timber revenues derived from unallotted lands on the original Hoopa Valley Reservation.

a. The Klamath River Reservation and the original Hoopa Valley Reservation, some 25 miles distant from one another, have entirely different origins. As explained above (see page 4, *supra*), the former was established by Executive Order in 1855 and it has been occupied at all relevant times principally by Yurok Indians; the latter was established by administrative action in 1864, recognized by subsequent Acts of Congress in 1865 and 1869, and formally set apart by Executive Order in 1876, and at all relevant times it has been occupied principally by Hoopa Indians. The two Reservations continued as physically separate entities, distinct for all practical purposes, for more than 25 years until the Hoopa Valley Reservation was extended to include the Klamath River Reservation (as well as intervening land) in 1891, and, for three-quarters of a century thereafter, the Executive and Congress continued to regard the two now connected areas as distinct territories in which only their respective residents, and their descendants, have a legitimate interest. From all that appears, this arrangement was satisfactory to all concerned until the 1950's, when the revenue generated by timber sales on the Square attracted the attention and interest of Indians who were not of the original Hoopa Valley Reservation, the individual respondents herein.

The Court of Claims nevertheless held, more than 80 years after issuance of the 1891 Executive Order, that the President had in fact intended to create a wholly integrated Reservation, in which the respective rights of the Indians residing on the formerly separate tracts would be merged. Hoopa Pet. App. B 99-105. The Court pointed to nothing manifesting such an intent and, remarkably, ignored the host of factors consistently pointing in the opposite direction. We highlight only a few of these points here.

b. The events leading up to the 1891 Executive Order demonstrate convincingly that the purpose of the Order simply was, as this Court stated in *Mattz* v. *Arnett*, "to have the *Klamath River Reservation land* protected for the Indians residing there" (412 U.S. at 502; emphasis added), in view of the uncertain status of that land and its people; there is no indication of a quite different purpose to give the Yurok Indians who remained on the Klamath River Reservation (or the Connecting Strip) an interest in land located *elsewhere*—on the original Hoopa Valley Reservation—that historically had been held for the benefit of Indians who resided on the latter reservation.

The background of the Hoopa Valley Reservation confirms this. To be sure, the original Hoopa Valley Reservation was not set aside exclusively for Hoopa Indians: the "Treaty" negotiated in 1864, when that Reservation was first located, mentioned three additional tribes for whose "sole use and benefit" the Hoopa Valley Reservation was set aside (Hoopa Pet. App. B 21), and the "Treaty" indicated that the benefits of the Reservation would also be available for other tribes who might thereafter "avail themselves of the benefit of this Treaty"—*i.e.*, by moving there. *Ibid.* Similarly, the 1864 letter from the Superintendent of Indian Affairs for California to the Commissioner describing his settlement with

the Indians on the Hoopa Valley Reservation observed that the Reservation had "land enough in cultivation to feed all the Indians that are there *or that may come there*" (*id.* at 20; emphasis added). Thus, the Yurok Tribe and its individual members were *potential* beneficiaries of the "Treaty" and the original Reservation, and individual members of the Yurok Tribe or other tribes who in fact moved there over the years have so benefited and have participated in the affairs of the Hoopa Valley Tribe. Hoopa Pet. App. B 67, 105. Indeed, there were proposals during the 1880's and in a House-passed bill in 1890 to abolish the Klamath River Reservation and to remove the Indians there to the Hoopa Valley Reservation. *Mattz* v. *Arnett*, *supra*, 412 U.S. at 502-503. If these proposals had been carried out, the Yuroks removed to the Hoopa Valley Reservation would have been entitled to participate in the benefits of that Reservation. However, the 1891 Executive Order effectively prevented this from occurring and instead preserved and protected the separate Klamath River Reservation (and the new Connecting Strip) for the Yuroks who resided there—the Indians from whom respondents herein trace their nexus to the expanded Hoopa Valley Reservation. Against this background, the Court of Claims stands history on its head in holding that respondents possess the very interest in the original Hoopa Valley Reservation they would have had if their forebearers had been removed there.

c. Nor, contrary to the Court of Claims' apparent belief, is there anything in the 1864 Act to support the notion that the 1891 Executive Order was intended to entirely integrate the formerly distinct Reservations and merge the substantive rights of the resident Indians into a common pool. As explained above (see page 5, *supra*), and as its very title indicates,[11] the 1864 Act

[11] "An Act to provide for the better Organization of Indian Affairs in California" (13 Stat. 39).

was principally an administrative measure to consolidate into one superintendency and four agencies the conduct of Indian affairs in California, which theretofore had been in a state of disarray. Given this thrust of the authorizing legislation, there is no basis for reading the Executive Order issued in 1891 consolidating the historically separate Klamath River and Hoopa Valley Reservations under the Hoopa Agency as intending drastically to alter the substantive rights of the Tribes and Indians concerned.

This purpose to preserve preexisting Indian rights is reflected as well in the final proviso to Section 2 of the 1864 Act, 13 Stat. 40, quoted at pages 5-6, *supra*, which granted the President authority to include in the four reservations permitted under that Act such reservations previously set apart in the State "as in the discretion of the President may be deemed for the best interests of the Indians to be provided for." The Klamath River Reservation had been set aside prior to the 1864 Act. Its inclusion in the Hoopa Valley Reservation (one of the four permitted under the 1864 Act) "for the best interests of the Indians to be provided for" therefore indicates that the purpose of the Executive Order was to *preserve* the then-threatened rights of the Yuroks on the Klamath River Reservation, not to *dilute* the rights of the Indians residing on the original Hoopa Valley Reservation.

d. Finally, as we have explained, events following 1891 confirm that the Klamath River Reservation (and the new Connecting Strip) retained an identity entirely separate from the original Hoopa Valley Reservation. The 1892 Act, for example, provided for the allotment of the Klamath River Reservation only to Indians residing there, with the proceeds of the sale of surplus lands likewise to be used only for their benefit. Indians elsewhere on the expanded Hoopa Valley Reservation were barred from participation. Congress has repeatedly confirmed the separate identity of the Klamath River Reservation since that date—in the 1917 Act permitting pro-

ceeds to be used for other purposes to benefit allottees on the Klamath River Reservation; the Act of Dec. 24, 1942, ch. 814, 56 Stat. 1081, 25 U.S.C. 348a, extending the trust period on lands allotted to "Indians of the Klamath River Reservation"; and the Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121, restoring to "tribal ownership" certain vacant lands of the "Klamath River" reservation. Similarly, the Connecting Strip was allotted pursuant to the General Allotment Act only to the Indians, principally Yuroks, located on the Strip. Hoopas and others residing on the original Hoopa Valley Reservation did not participate.

This Court, too, has viewed the original Hoopa Valley Reservation and the Extension as having a distinct character. In *Donnelly* v. *United States*, *supra*, the Court spoke of "an Indian reservation known as the Extension of the Hoopa Valley Reservation" (228 U.S. at 252). And in *Mattz* v. *Arnett*, *supra*, the holding of the Court was that the "Klamath River Reservation" continued to exist; the Court did not view that Reservation as merely an area within the larger Hoopa Valley Reservation, having no more than historical significance.

2. In different circumstances, this view of a divided Indian reservation as a single communal unit, however erroneous, might be of limited practical importance. Not so here.

a. Under 25 U.S.C. 407, the Secretary of the Interior is authorized to sell timber on unallotted lands in an Indian reservation and to use the proceeds "for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct." [12] Against the historical background, discussed above, it was entirely reasonable for the Secretary to conclude that the Hoopa Valley Tribe is the tribe concerned with timber cutting on the original Hoopa Valley Reservation

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[12] Prior to 1964, Section 407 provided that timber proceeds were to be "used for the benefit of the Indians of the reservation in such manner as he [the Secretary of the Interior] may direct." 25 U.S.C. (1958 ed.) 407.

and that the resulting revenues therefore should be used for the benefit of the members of that Tribe. It was, correspondingly, clearly wrong for the Court of Claims to reject this reasonable determination by the official charged by Congress with the administration of Indian affairs—and the reasonable Executive interpretation of an Executive Order, on which it was based—and to direct instead an effective merger of the property interests of the two separate groups of Indians. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Under the Court of Claims' decisions, the 1891 Executive Order no longer is a shield with the limited purpose of protecting the interest of the Yuroks and others in their own lands on the Klamath River Reservation and the Connecting Strip. It has been recast into a sword, by which these individuals and their descendants have sought to carve out for themselves an interest—perhaps the majority interest[13]—in land that historically has been held for the benefit of others. The Court of Claims' holding therefore breaks the solemn commitment in the 1864 "Treaty" for the creation of the Hoopa Valley Reservation—an agreement that effectively received the approval of Congress in a series of statutes passed beginning in the following year—that the Reservation would be held for the "sole use and benefit" of the named tribes and others who might avail themselves of the benefit of the "Treaty" by moving there.[14]

b. Moreover, the full practical implications of the Court of Claims' substitution of its judgment for that of the Secretary, although perhaps only possibilities when this Court denied certiorari in 1974, have now become

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[13] If all 3800 respondents were found to be entitled to receive a per capita payment, they would realize approximately 70% of the timber revenues generated on the Square.

[14] Although several Yuroks did avail themselves of the benefit of the "Treaty" by residing on the Square, those through whom respondents claim did not.

intractable realities. For instance, the fact that the Yurok Tribe has refused to become an organized tribe underscores the reasonableness of the Secretary's decision. The Hoopa Valley Tribe is a well-organized tribe, functioning as a government for its members. The Yurok Tribe, on the other hand, is not. It is entirely correct, then, for the Secretary to treat a portion of the Reservation as pertaining to the Hoopa Valley Tribe, so that this Tribe, at least, will have the normal aspects of Indian life.

Similarly, the present managerial situation on the Hoopa Valley Reservation highlights the unworkable nature of the Court of Claims' holdings. Under that court's reasoning, because there are apparently more Yuroks than Hoopas entitled to share in the distribution of timber revenues, the Yuroks should have a large say in the management and disposition of all of the Reservation's unallotted timber resources. Yet the respondents in this suit thwarted the Secretary's recent efforts to establish a workable management framework for the Reservation by rejecting an interim organization for the Yurok Tribe. The Yurok Tribe therefore remains in no position to take any unified view in the governing of the Reservation. On the other hand, the Hoopa Valley Tribe, because it apparently lacks a majority of the Indians of the Reservation, cannot effectively govern the allocation of the unallotted resources on the Square or elsewhere—a principal responsibility of any tribal government.

3. a. The Court of Claims' 1981 order also demonstrates how far that Court has strayed into areas traditionally reserved for the Congress and the Executive Branch, or for the Indian tribes themselves. The government's motion to substitute the unorganized Yurok Tribe as a plaintiff attempted to safeguard the established rule that the resources on a reservation are tribal resources, to be enjoyed by the members through the tribe, and do not belong to individual Indians. See, *e.g.*, *United States*

v. *Jim*, 409 U.S. 80, 82 (1972), and cases cited. The Court of Claims, in denying that motion, has placed itself in the position of determining who are "Indians of the Reservation," and thus, essentially, determining the membership of the Yurok Tribe, or some larger entity including the Hoopas as well.

That matter is peculiarly inappropriate for judicial resolution. It involves questions such as the quantum of Indian blood to be required, the time of residence on the reservation for the would-be member or perhaps an ancestor, and the weight to be accorded to tribal traditions. Accordingly, the cases leave this sort of issue to the tribes themselves to determine. In *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), for example, an Indian sought declaratory and injunctive relief against enforcement of a tribal ordinance denying membership to children of female members who had married outside the Tribe. This Court found that the federal courts lacked jurisdiction to resolve that sort of issue. The Court stated (436 U.S. at 72 n.32):

> A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. See *Roff* v. *Burney*, 168 U.S. 218 (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906). Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

If a tribe does not determine its own membership, the Secretary is authorized by Congress to draw up a membership roll, where this would be in the best interests of the Indians. 25 U.S.C. 163. But Congress has not authorized the courts to perform this function. Accordingly, the Court of Claims here should not be attempting to determine who are "Indians of the Reservation," which

determination is tantamount to determining the membership of the Yurok Tribe.[15]

b. The Court of Claims also entered the realm of the political branches when it determined that the Hoopa Valley Tribe could not be given the beneficial use of the Square. The recognition of an Indian tribe, and its territory, is a question for Congress and, in the absence of congressional action, for the Executive Branch. As this Court stated in *United States* v. *Holliday*, 70 U.S. (3 Wall.) 409, 419 (1865):

> The facts in the case * * * show distinctly "that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved." In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs.

Similarly, see *Baker* v. *Carr*, 369 U.S. 186, 215 (1962), where the Court reaffirmed *Holliday* and reiterated in some detail the principle that the recognition of Indian tribes is a matter left exclusively to the Executive and Congress.[16]

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[15] The Court of Claims (Hoopa Pet. App. A 14) indicated that the standards for membership in the Hoopa Tribe might appropriately be applied to the Yurok Tribe. The application of such standards, while convenient, should not replace determinations made by the Yurok Tribe itself or, if that Tribe fails to act, standards determined by the Secretary of the Interior. While the Court of Claims acknowledged that there may be differences between the two Tribes (*id.* at 15), it did not suggest by what standards the trial judge is to apply these differences in fashioning membership criteria.

[16] Indeed, in discussing the precise political question raised in *Holliday*, *Baker* points out:

> The Chief Justice did say that "The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts," but here he referred to *their existence*

A tribe's territorial boundaries generally define the tribe's jurisdiction. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 141-144 (1980). It is, however, plainly a question of judgment for the political branches in the first instance to decide how tribal reservations should be established (and in a case such as this, over what part of a reservation a particular tribe should have jurisdiction), in order to form functioning political entities capable of real service to their people.

The present case is illustrative. The Hoopa Valley Tribe has been a successful, effective tribe on the Square. The consequence of the Court of Claims' decisions, however, is to take away control of the Square from the Hoopa Valley Tribe and to replace it with no tribal control, particularly since the Yurok Tribe refuses to organize.

Moreover, the results of this intrusion may extend well beyond the Hoopa Valley Reservation. Many statutes authorizing the creation of reservations include discretionary language as to the determination of tribal beneficiaries similar to that contained in the Act of Apr. 8, 1864. See United States Department of the Interior, *Federal Indian Law* 608-609 n.7 (1958). Redefinition of tribal jurisdiction here will unavoidably threaten the stability of tribal jurisdiction on those reservations.

c. Finally, even assuming that individual respondents are entitled to benefit from the revenues generated by the sale of timber resources on the Square, the Court of Claims erred in ordering that a per capita distribution be made to them. Section 407 of Title 25 provides that such revenues are to be used for the benefit of members of

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"as a state, as a distinct political society, separated from others . . . ."

369 U.S. at 215-216 n.43 (emphasis added). For this same reason, the recognition of the Yurok Tribe—as presented in the context of the Gerard Plan and the government's substitution motion—was entitled to the deference of the Court of Claims. As in 1973, however, the principle has been unheeded by that court.

the tribe concerned in such manner as the *Secretary* may direct. Per capita distributions have been made to individual members of the Hoopa Valley Tribe pursuant to the request of the Council for that Tribe, but the Secretary was not required to consent to such a distribution. The monies could have been expended instead for common improvements in the area in which the tribal members reside. Similarly, even if some of the respondents may be within the class to be benefited by those revenues, the Secretary would not be required to provide for a per capita distribution, even though he may have permitted a per capita distribution of the portion allocated to the Hoopa Valley Tribe. The holding below therefore thrusts the courts into the management of trust resources in this additional way as well.[17]

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[17] It may be argued that, in its 1981 decision, the Court of Claims determined that individual "Indians of the Reservation" actually have an individualized interest in the resources of the Reservation. Such a ruling would be contrary to this Court's repeated holdings that reservation resources are communally held by tribes and that until individual distributions are made, individual tribal members have no individual interest in the resources. See *United States* v. *Jim*, *supra*, 409 U.S. at 82.

We do not believe the opinion should be read in this fashion. While the Court of Claims' decisions require per capita payments to all "Indians of the Reservation," they appear to do so only because similar payments already have been made to members of the Hoopa Valley Tribe, and the Court of Claims is attempting to treat the other Indians on the Reservation on an equal basis. Hoopa Pet. App. A 8-9. Of course, even this holding conflicts with the Secretary's authority to direct the use of timber revenues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ANTHONY C. LIOTTA
Deputy Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

EDWARD J. SHAWAKER
ERIC S. GOULD
JAMES E. BROOKSHIRE
Attorneys

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